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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KELVIN D. DANIEL, et al

Plaintiffs,

vs.

SWIFT TRANSPORTATION
CORPORATION,

Defendant

Case No.: 2:11-CV-01548-ROS

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

EXHIBIT

D

MEMORANDUM OF LAW

I. Background

On August 8, 2011, Plaintiffs filed a Class Action Complaint and Demand for Jury against Defendant, Swift Transportation Corporation ("Swift"). The Complaint alleges that Swift violated certain provisions of the Fair Credit Reporting Act, ("FCRA"), 15 U.S.C. Sec. 1681 et seq. in its use of consumer reports for employment purposes. Swift is alleged to have purchased consumer reports about job applicants without first providing an FCRA compliant notice to or obtaining a proper authorization from each applicant. The Complaint further alleged that Swift violated the 'pre-adverse action', 'adverse action' and other notice provisions of the FCRA when it denied employment based upon the consumer reports.

On October 3, 2011, Swift filed a partial motion to dismiss pursuant to Fed. R. Civ. P. 12(b) seeking to dismiss Count One as it pertains to Daniel and Bell, Count Two as it pertains to Daniel, and Count Three as it pertains to Daniel, Hodges and Bell. On October 24, 2011, Plaintiffs timely filed their first Amended

1 Complaint pursuant to Fed R. Civ. P. 15(a)(1)(B). Said
2 Amended Complaint renders Swift's Motion to Dismiss and
3 the arguments contained therein as moot.
4

5 **II. Argument as to Mootness**

6 **A. Plaintiffs' First Amended Complaint renders**
7 **Swift's Motion to Dismiss moot.**

8 F.R.Civ.P 15(a)(1)(B) permits a party to amend a
9 pleading as a matter of course and without leave of
10 court, even if a responsive pleading has been served,
11 as long as the motion is timely. To be timely, it must
12 be filed twenty-one (21) days after service of a
13 responsive pleading or twenty-one (21) days after
14 service of a motion under 12(b), (e), and (f),
15 whichever is earlier. The effect of a timely motion is
16 to render any motion grounded in Fed. Civ. R. P. 12
17 subsections (b), (e), and (f) moot. See *Peak N.D., LLC*
18 *v. Wilkinson*, 2010 U.S. Dist. LEXIS 52239 at *7-*8
19 (D.N.D. May 25, 2010). In this matter, Swift filed its
20 Answer and Fed. Civ. R. 12(b)(6) Motion to Dismiss on
21 October 3, 2011. Plaintiffs filed the First Amended
22 Complaint on October 24, 2011, within 21 day after
23 service of Swift's Motion. The Amended Complaint,
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1 being filed timely under Fed. Civ. R. 15(a)(1)(B),
2 therefore renders Swift's Motion to Dismiss moot.

3 **III. Alternative Response to Motion To Dismiss.**
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5 **A. Plaintiffs' First Amended Complaint cures the**
6 **issues set forth in Swift's Motion to Dismiss.**

7 **1. Count One.**

8 Swift argues that 15 U.S.C. Sec. 1681b(b)(2)(A)
9 does not apply to Daniel or Bell. This section
10 provides that an employer may not procure a consumer
11 report for employment purposes unless a written stand-
12 alone, clear and conspicuous disclosure is provided to
13 the job applicant prior to the report being procured,
14 and only if the consumer has authorize this procurement
15 in writing. Notably, this section does not apply to
16 job applicants who seek positions regulated by the U.S.
17 Secretary of Transportation (e.g., trucking positions)
18 and whose **only** interaction with the employer is by
19 mail, telephone, computer, or other similar means. See
20 15 U.S.C. § 1681b(b)(2)(C). For these applicants, 15
21 U.S.C. § 1681b(b)(2)(B) requires that at any time prior
22 to a consumer report being procured, the employer must
23 provide the applicant, by oral, written or electronic
24 means, notice that a consumer report may be obtained
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1 for employment purposes, as well as a summary of the
2 applicant's rights under Section 1681m(a)(3). The job
3 applicant then must provide oral, written or electronic
4 consent prior to the procurement of the consumer
5 report.
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7 Swift argues that the requirements of 15 U.S.C. §
8 1681b(b)(2)(B) apply to Daniel (and not the more
9 stringent requirements of 15 U.S.C. § 1681b(b)(2)(A) as
10 set forth in Count One) because he applied for a
11 trucking position via the internet. But the facts
12 pertaining to Daniel demonstrate that although he
13 initially applied for a position online, Swift later
14 had in-person contact with him **prior** to procuring his
15 consumer report. Because of this in person contact,
16 and pursuant to 1681b(b)(2)(C)(ii)¹, Swift was required
17 to provide Daniel with a written, clear and conspicuous
18 stand-alone disclosure and obtain his written consent
19 as required by §§ 1681b(b)(2)(A)(i) and (ii) prior to
20 procuring his consumer report for employment purposes.
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22 Plaintiffs' First Amended Complaint clarifies that
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27 ¹ 15 U.S.C. § 1681b(b)(2)(C)(ii) provides that the less stringent notice
28 and authorization provisions in 1681b(b)(2)(B) only occur when at the
time the employer procures the consumer report, the only interaction
between the applicant and the employer has been by mail, telephone,
computer or other similar means.

1 Swift had in-person contact with Daniel prior to it
2 procuring his consumer report. Construing the facts in
3 favor of Daniel provides him with a viable cause of
4 action and renders this portion of Swift's Motion to
5 Dismiss moot.
6

7 As an aside, Swift further argues that Count One
8 does not apply to Bell because he applied via
9 facsimile. Plaintiffs' First Amended Complaint
10 withdraws Bell as a party under Count One, rendering
11 Swift's Motion to Dismiss him from the same moot.
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14 2. Count Two

15 Swift similarly seeks a partial dismissal of
16 Daniel from Count Two of Plaintiffs' First Complaint
17 arguing that 15 U.S.C. §1681b(b)(3)(A)'s pre-adverse
18 action rights do not apply to Daniel since he applied
19 for a position via the internet. This section provides
20 that prior to taking **any** adverse action, based in whole
21 or in part on the report, the employer shall provided
22 the job applicant with a copy of the consumer report
23 and a written description of consumer rights
24 promulgated by the Federal Trade Commission. These
25 rights provide the applicant the opportunity at least
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1 to review the consumer report and have an understanding
2 of their rights **prior** to being declined employment or
3 terminated.
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5 These rights, however, are not afforded to job
6 applicants who apply for positions (trucking positions)
7 over which the Secretary of Transportation has the
8 power to establish qualifications and maximum hours of
9 service. Instead, trucking applicants are afforded
10 rights under 15 U.S.C. § 1681b(b)(3)(B). This provision
11 allows the employer to decline employment based upon a
12 consumer report, provided that within three (3) days,
13 the applicant receives the following: (1) oral, written
14 or electronic notification that adverse action was
15 taken based in whole or in part on the consumer report;
16 (2) the identity and contact information of the
17 reporting agency; and (3) notice that the reporting
18 agency did not made the adverse decision and notice to
19 the applicant that he or she may, upon providing proper
20 identification, receive a free copy of the report and
21 dispute the information contained therein.
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23 However, as discussed above, Daniel's interaction
24 with Swift **prior** to it procuring his consumer report
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1 went beyond interaction over the mail, telephone,
2 computer or other similar means as conditioned in 15
3 U.S.C. § 1681b(b)(3)(C)(ii). Instead, Daniel, like
4 many applicants, attended Swift's in-person orientation
5 prior to Swift procuring his consumer report. As such,
6 Daniel, and all others like him, are entitled to
7 Section 1681b(b)(3)(A) protections. With the
8 clarification of these facts set forth in Plaintiffs'
9 First Amended Complaint, Swift's argument to dismiss
10 Count Two is now moot.

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14 **3. Count Three**

15 Plaintiffs' Complaint alleges that Swift violated
16 Daniel and Hodges's consumer rights under 15 U.S.C.
17 Sec. 1681m(a)(3)(A) and 15 U.S.C. Sec. 1681m(a)(2)(B)
18 by failing to provide them with proper notice that they
19 could receive a copy of the consumer report used for
20 employment purposes, and that the reporting agency did
21 not make the adverse employment decision. Swift moved
22 to dismiss Count Three as it pertains to both Daniel
23 and Hodges arguing that a majority of District Courts
24 have rejected a private cause of action under 15
25 U.S.C. § 1681m. Plaintiffs' First Amended Complaint
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1 does not include claims under this section, rendering
2 Swift's motion to dismiss Count Three moot.

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4 Respectfully Submitted,

5 STUMPHAUZER O'TOOLE MCLAUGHLIN
6 McGLAMERY & LOUGHMAN CO LPA

7 /s/ Dennis M. O'Toole

8 /s/ Matthew A. Dooley

9 /s/ Anthony R. Pecora

10 LUBIN AND ENOCH, P.C.

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12 /s/ Stanley Lubin

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14 LITIGATION ASSOCIATES, P.C.

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16 /s/ Leonard A. Bennett

17 *Counsel for Plaintiffs*

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20 **CERTIFICATE OF SERVICE**

21 This will certify that a copy of the foregoing
22 Plaintiffs' Response to Defendant's Motion to Dismiss
23 was filed electronically this 28th day of October, 2011.
24 Notice of this filing will be sent to all counsel of
25 record by operation of the Court's electronic filing
26 system.
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/s/ Anthony R. Pecora
Counsel for Plaintiffs

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